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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

v.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

TO the HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner CITY OF ROHNERT PARK, a municipal corporation, respectfully prays that a writ of certiorari issue to

review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 24, 1979 (App. p. 220), and corrected by Order of October 26, 1979 (App. pp. 307-8), the same having followed the entry of judgment (App. p. 189) by the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals of July 24, 1979, reported, at 601 F.2d 1040, appears in the Appendix hereto *sub nom City of Rohnert Park v. Patricia Roberts Harris, et al.* (App. p. 220), together with the opinion and judgment of the United States District Court for the Northern District of California (App. pp. 183-189) *sub nom City of Rohnert Park v. James T. Lynn, et al.* An earlier opinion and judgment of the Court of Appeals filed on May 9, 1979 (hereinafter *first* opinion), later "withdrawn," appears in the Appendix (App. p. 192).

JURISDICTION

The *first* opinion and order of the Court of Appeals was entered in this proceeding on May 9, 1979, after a timely Notice of Appeal from a judgment of the United States District Court (App. p.189) was filed on December 15, 1976. A timely petition for rehearing and suggestion of hearing in banc was denied on July 24, 1979, and its *first* opinion was "withdrawn" by the Court of Appeals (App. p. 224). The *second* opinion and order in this proceeding was entered on July 24, 1979 (App. p. 220), and a timely petition for rehearing and suggestion of hearing in banc was filed on August 6, 1979 (App. pp. 241-253) and denied on October 26, 1979 (App. p. 254). The Court of Appeals also issued an order correcting the *second* opinion on the same date (App. p. 307).

PERTINENT STATUTES

1. Sherman Act, 15 U.S.C. 1 et seq., and more particularly Sections 1 and 2;
2. Clayton Act, 15 U.S.C. 12 et seq., and more particularly Section 26;
3. Administrative Procedure Act, 5 U.S.C. 551 et seq. and 5 U.S.C. 701 et seq., and more particularly Sections 702 and 706;
4. National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq., and more particularly 5 U.S.C. 1460(c)(4).

Copies of these appear in the Appendix at p. 341 through p. 346.

QUESTIONS PRESENTED

An appeal was taken by Petitioner (plaintiff in the District Court) from a separate judgment entered in the United States District Court following an Opinion of the Honorable William W. Schwarzer (App. p. 183) granting Respondents' motions for summary judgment. Notwithstanding appropriate allegations in the Complaint For Declaratory and Injunctive Relief (hereinafter Complaint) (App. pp. 1-42). Judge Schwarzer did not so much as mention Petitioner's claim for relief under the Administrative Procedure Act (5 U.S.C. 702, 706) for violation of the National Housing Act of 1949, as amended [42 U.S.C. 1441 et seq., 1460(c)(4)]. He granted summary judgment only on the claim for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26), finding that (App. p. 187): "• • • plaintiff has made no showing from which a trier of fact could find ongoing violations of the antitrust laws. • • •." More significantly, Judge Schwarzer did not either mention or hold that Petitioner lacked standing to seek relief under Section 16, Clayton Act (15 U.S.C. 26). By its failure to deal with the issue of standing, the District Court, at least by inference, conceded that Petitioner *did* have standing.

However, the Court of Appeals, instead of reversing and remanding to allow amendment of the Complaint and presentation of further evidence on the issue of standing, remanded for dismissal for lack of standing (App. p. 239). Indeed, the Court of Appeals stated in part (App. p. 227): "We need not reach the question whether summary judgment was appropriate * * *." Accordingly, it never reached the point of determining there was "no genuine issue of any material fact" (Rule 56(c), Federal Rules of Civil Procedure).

During the proceedings before the District Court, the reality of Petitioner's injury from violation of a "relevant statute" was not questioned by the District Court nor by Respondents. In this connection, it should be noted that the allegations of the Complaint regarding this injury (App. pp. 8, 13-14) were not "pierced" by any evidence submitted by Respondents and admissible under Rule 56, Federal Rules of Civil Procedure. Nor did the District Court even mention "threatened loss or damage" under 15 U.S.C. 26, although Petitioner alleged such loss as well as economic loss in its Complaint (App. p. 4). Notwithstanding, the Court of Appeals made impermissible findings of fact not supported by any evidence, on these and other issues. Had the reality of Petitioner's injury and these other issues, including standing, been raised by the Court or the Respondents during the proceeding before the District Court, Petitioner should have been given notice thereof, a hearing and an opportunity to produce admissible evidence demonstrating that there were genuine issues of material facts regarding the reality of its injury or that its Complaint could be amended to state a claim for relief and standing to assert it. On July 24, 1979, the Opinion and Order of the Court of Appeals stated in part: "We remand for dismissal in accordance with this opinion" (App. p. 239), holding, *inter alia,* that Petitioner lacked standing to assert any

claims for relief. The Court of Appeals did not affirm the judgment of the District Court, but treated the motions for summary judgment as motions to dismiss for failure to state any claims for relief and lack of standing to assert them, thereby introducing both confusion and ambiguity into this proceeding. Under such circumstances, Petitioner should have been given an opportunity to amend its Complaint, but was not, and it was thus denied due process of law. Even treated as affirming summary judgment, the Opinion and Order of July 24, 1979, *made impermissible findings of fact on appeal,* a plainly erroneous application of Rule 56, Federal Rules of Civil Procedure.

In the setting above outlined, the following questions are presented:

1. Whether Petitioner was denied due process of law for failure of the Court of Appeals to reverse and remand to the District Court for amendment of its Complaint, for the taking of evidence on issues as to which it made findings of fact on questions not resolved by said District Court or both?

2. Whether the Court of Appeals erred in dismissing for lack of standing an appeal from a judgment granted on motions for summary judgment.

3. Whether Petitioner has standing to seek injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26) for threatened loss or damage under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2)?

4. Whether, within the context of this proceeding, Petitioner has standing to seek relief under the Administrative Procedure Act (5 U.S.C. 702 and 706) for violation by Respondent Secretary of Housing and Urban Development of a relevant statute, namely, 42 U.S.C. 1460(c)(4) and its regulations thereunder (App. pp. 347-367)—sale of federally subsidized urban renewal land at less than its "fair value?"

5. Whether the Court of Appeals for the Ninth Circuit erred in not following the rationale of its own decision in *California Diversified Services Inc. v. Musick* and the decision in *Mid-West Paper Products v. Continental Group, Inc.* in the Third Circuit as well as failing to follow the rationale of the decision of this Court in *Warth v. Seldin,* all three cases cited infra?[1]

6. Whether a federal appellate court has the right to dismiss a complaint on appeal from a judgment entered upon motions for summary judgment where the record shows genuine issues of material facts?

STATEMENT OF THE CASE

This is a case wherein Petitioner has alleged that Respondent HUD has illegally subsidized a violation of the anti-trust law. It has done so by sanctioning a clear violation of the National Housing Act of 1949, as amended (42 U.S.C. 1441 et seq.). The sale of federally subsidized urban renewal land by the Santa Rosa Respondents at less than its "fair value"[2] to Respondent Hahn with the invalid and unlawful concurrence of Respondent HUD is a violation of 42 U.S.C. 1460(c)(4) and regulations thereunder, and

1. *California Diversified Services Inc. v. Musick* (C.A. 9) 505 F.2d 278 (1974); *Mid-West Paper Products v. Continental Group Inc.* (C.A. 3) 596 F.2d 573 (1979); and *Warth v. Seldin* (1975) 422 U.S. 490, 45 L.Ed.2d 343.

2. Four months after Respondent HUD concurred in a land disposition price of $2,000,000 for 20 acres ($100,000/acre), *Respondent Hahn agreed to sell 6.33 acres of the same land for $3,000,000 ($473,934/acre) — almost five (5) times what HUD thought was "fair value"* (App. p. 374). Cf. *Foeller v. Housing Authority of Portland* (1953) 198 Ore. 205, 256 P.2d 752, 767 ["Re-sales (by the Housing Authority) cannot offer private persons opportunities for enrichment or exploitation, for the act declares that property must be sold 'at its fair re-use value' * * *."]. See also *Duskin v. San Francisco Redevelopment Agency* (1973) 31 C.A.3d 769 [sale at "fair value" required under 42 U.S.C. 1460(c)(4) and Section 33433, California Health & Safety Code].

said violation thus illegally subsidizes the Hahn Santa Rosa regional shopping center, thereby producing a result unlawful under the Sherman Act (15 U.S.C. 1, 2). Indeed the Court of Appeals said (App. p. 239): "Assuming we were to grant the requested relief, we would have to remand to the district court for a determination of fair reuse value in accordance with the regulations." A sale at fair value would also minimize, if not eliminate the illegal subsidy to Respondent Hahn. If the Santa Rosa regional shopping center is built by Respondent Hahn upon land the cost of which was illegally subsidized, it will monopolize about 85% of the market for new retail space within the Santa Rosa Trade Area. The result of this exclusionary and predatory conduct of Respondents will be the absolute exclusion from the relevant market of Petitioner and those property owners, taxpayers and inhabitants for whom it speaks. All of them, being in the target area of the conspiracy or attempt to monopolize, will suffer injury in fact, economic, or otherwise, unless Respondents are enjoined from these ongoing violations of the antitrust laws.

On November 19, 1974, Petitioner filed its Complaint (App. pp. 1-42), alleging, *inter alia,* a violation by Respondents of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) and a violation of the National Housing Act of 1949, as amended, 42 U.S.C. 1441 et seq. and in particular, 42 U.S.C. 1460(c)(4). Petitioner sought injunctive relief under Section 16 of the Clayton Act (15 U.S.C. 26) and Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706), praying for an order setting aside Respondent HUD's concurrence (agency action) in the price at which the urban renewal land was to be sold by the Santa Rosa Respondents to Respondent Hahn. Jurisdiction of the District Court was invoked under 28 U.S.C. 1331, 1337 and 2201, together with 5 U.S.C. 702.

The purpose of the Petitioner's suit was to enjoin the continuance by Respondents of a current ongoing con-

spiracy which has for its purpose a violation of the antitrust laws, namely, a conspiracy or attempt to monopolize approximately 85% of the new commercial retail space needs within the Santa Rosa Trade Area. The unlawful means used by Respondents involve a violation of 42 U.S.C. 1460 and, unless enjoined, will produce a result forbidden under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2). In so illegally subsidizing Respondent Hahn with actual knowledge of the monopoly to be established (App. pp. 7, 371-372), Respondent HUD has arrayed itself on the side of one competitor, Respondent Hahn, against Petitioner, a competitor, and is part of the conspiracy or attempt to monopolize amongst all Respondents to the complete exclusion of Petitioner, together with its property owners, taxpayers and inhabitants from the relevant market for new retail space in the Santa Rosa Trade Area until at least 1990 (App. pp. 371-372).[3] The Santa Rosa Respondents had actual knowledge in 1972 that the regional shopping center to be built by Respondent Hahn of about 680,000 square feet would "* * * kill off any possibility of a major development in Rohnert Park * * *." (App. p. 369) and conspired with Respondent Hahn to build "excess capacity" to insure that death occurred. See *United States v. Aluminum Company of America* (C.A.2) 148 F.2d 416 (1945)—abuse of its monopoly power by continuing construction of excess capacity to prevent the entry of others was a violation of the antitrust laws.

Petitioner, a municipal corporation, is located in Sonoma County about seven miles south of Respondent City of Santa Rosa, also a municipal corporation, and both are

3. In its Final Environmental Impact Statement (FEIS), Respondent HUD stated that the proposed regional shopping center (700,000 square feet) would absorb most of the need for new retail space in the relevant market until about 1990 (App. pp. 371-372). In actuality, Respondent Hahn's regional shopping center will be 835,000 square feet (App. p. 376), representing *excess capacity* of 19% over what HUD said would not be absorbed in the relevant market until 1990.

located within the Santa Rosa Trade Area, the relevant market, which includes all of Sonoma County and part of northern Marin County in California. The boundaries of this relevant market are not disputed. Over the period from 1966 to 1972, an amount in excess of $1,200,000 was spent by Petitioner for street construction, sewers, water mains, drainage and other improvements necessary to make a large site within Petitioner's boundaries suitable for commercial development. Most of the funds required to defray the cost of these improvements were raised by special assessments levied by Petitioner against the various property owners of the property (App. p. 4). Petitioner itself owns two parcels of property within the site to be commercially developed and is within the target area of the conspiracy or attempt to monopolize. In raising and disbursing these funds for these improvements, Petitioner was acting in its proprietary capacity using funds held as a trust for the benefit of the individual property owners so assessed. *City of Seattle v. Stirrat* (1909) 55 Wash. 560, 104 Pac. 835, 836-837.

Contrary to the notion expressed by the Court (App. p. 230), at no time did Petitioner ever complain that it was not selected by Respondent HUD or anyone else as the site for a *federally subsidized* regional shopping center. However, Respondent Hahn induced Sears Roebuck & Co. to abandon any plans it might have made to build in Rohnert Park by means which, in California, represent an actionable tort. *Buckaloo v. Johnson* (1975) 14 C.3d 815. See App. pp. 324-328 for status of the Sears department store in Santa Rosa, now almost completed.[4] Prior to

4. See *Jones v. Securities and Exchange Commission* (1936) 298 U.S. 1, 80 L.Ed. 1015; *Griffin v. County School Board of Prince Edward County, Va.* (C.A. 4) 363 F.2d 206 (1966) cert. den. 385 U.S. 960, and *People of Saipan v. United States Department of Interior* (C.A. 9) 502 F.2d 90 (1974), cert. den. 420 U.S. 1003, in connection with Petitioner's Motion For Judgment of Civil Contempt (App. p. 255). On a less than complete record, it was denied (App. p. 306).

November 19, 1974, it became clear to Petitioner, whose plans for a *privately financed* regional shopping center within its boundaries were moving forward, including appropriate zoning,[5] could not fairly compete with a federally subsidized regional shopping center in Santa Rosa. The latter was to be built on urban renewal land the acquisition cost of which was being financed by Respondent HUD at a total cost of about $28,000,000 (App. p. 6). Respondent City of Santa Rosa Urban Renewal Agency (hereinafter Urban Renewal Agency), with the approval of Respondent City of Santa Rosa's City Council, had acquired the land with federal funds, and, by an exclusive agreement with Respondent Hahn, proposed to sell this federally subsidized land only to Respondent Hahn at far less than its fair value (See App. pp. 169-172 for Stahr Affidavit on "fair value" filed by Petitioner and not contravened by any admissible evidence or any affidavit submitted by Respondents). Thus, since February 1972, this exclusive agreement has acted as a threat directed against Petitioner and effectively foreclosed by contract or conspiracy any

5. In September, 1974, the Santa Rosa Respondents filed an action in the Sonoma County Superior Court, the purpose of which was to enjoin any commercial development in Rohnert Park by invalidating the environmental impact report on its rezoning, thus eliminating any competition for the proposed regional shopping center in Santa Rosa. Judgment was entered for Rohnert Park in December, 1974, after a trial, and no appeal was taken. See *California Motor Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 30 L.Ed.2d 642, and *Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc.* (D.C. Wisc.) ..... F.Supp. ..... (1979) summarized at No. 939, ATTR of Nov. 15, 1979, at pp. A-16 to A-17. One baseless suit affecting business relationships of a competitor may support a claim for relief under the Sherman Act. Petitioner alleged that the Superior Court suit was brought for the anticompetitive purpose of enjoining "* * * any development of Plaintiff City's commercial site * * *." (App. p. 13).

effort by it to proceed with its own commercial development. Knowing that Respondent HUD would have to approve any land disposition price, Respondent Hahn and the Santa Rosa Respondents conspired with Respondent HUD to exclude Petitioner from the relevant market and to monopolize that market by obtaining an illegal subsidy —concurrence in a land disposition price at far less than its fair value.

In order to further its own proprietary interests and that of its specially assessed property owners and taxpayers, Petitioner adopted a general or master plan as required by California Government Code, Sections 65300 and 65302. It designated certain real property within its boundaries as a site for commercial development, including a privately financed regional shopping center (App. p. 4). As required by law, Petitioner also adopted zoning consistent with said general plan, zoning which as described earlier herein, the Santa Rosa Respondents unsuccessfully sought to enjoin for anticompetitive purposes.

On these facts, Petitioner has standing to seek declaratory and injunctive relief under Section 16, Clayton Act (15 U.S.C. 26) and judicial review of agency action by Respondent HUD under Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706), as well as injunctive relief. It has such standing to vindicate the broad public interest in enforcement of the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 130, 23 L.Ed.2d 129, 152 ("* * * That remedy (Section 16) is characteristically available even though the plaintiff has not yet suffered actual injury, * * *."); *State of Washington v. Automobile Manufacturers Assn.* (C.A. 9) 538 F.2d 231, 235, 237 (1976), *State of California v. Automobile Manufacturers Assn.* (C.A. 9) 481 F.2d 122, 131 (1973), cert. den. 414 U.S. 1045, 38 L.Ed.2d 336 (1973); *Mid-West*

Paper Products Co. v. Continental Group Inc. supra, citing *Zenith Radio Corp.,* supra, with approval at page 594.[6] *Association of Data Processing Service Organization v. Camp* (1970) 397 U.S. 150, 153-154, 25 L.Ed.2d 184, 188. See *Sierra Club v. Morton* (1972) 405 U.S. 727, 733, 31 L.Ed.2d 636, 642. See also 42 U.S.C. 1441; *Barlow v. Collins* (1970) 397 U.S. 159, 162, 25 L.Ed.2d 192, 197; *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661, 671-672 (1975).

The Court of Appeals assumed without deciding that it would have jurisdiction of Petitioner's claim for relief under the antitrust laws against Respondent HUD and the Santa Rosa Respondents (App. p. 226). See *City of Lafayette, La. v. Louisiana Light & Power Co.* (1978) 435 U.S. 389, 55 L.Ed.2d 364, and *Hecht v. Pro-Football, Inc.* (C.A. D.C.) 444 F.2d 931 (1971), cert. den. 404 U.S. 1047, 30 L.Ed.2d 736. The District Court assumed without deciding that Respondents' activities involved interstate commerce (App. p. 185). See *Hospital Building Co. v. Rex Hospital Trustees* (1976) 425 U.S. 738, 48 L.Ed.2d 338, and Gruen Affidavit (App. pp. 179-183) filed by Petitioner and not contravened by any affidavits of Respondents. See also *Bratcher v. Akron Board of Realtors* (C.A. 7) 381 F.2d 723 (1967).

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6. See also 42 U.S.C. 3532(b): "(b) The Secretary (of HUD) shall, among his responsibilities * * *; encourage private enterprise to serve as large a part of the Nation's housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department (of Housing and Urban Development); * * *." and *Grammercy Spire Tenants' Assn. v. Harris* (D.C. N.Y.) 446 F.Supp. 814, 821 (1977).

REASONS FOR GRANTING THE WRIT

IA

The Supreme Court of the United States Has the Inherent Power to Supervise the Administration of Justice in the Lower Courts, Particularly Where, as Here, the Decision Below Denies to Petitioner Due Process of Law, Thus Sanctioning a Radical Departure from the Accepted and Usual Course of Judicial Proceedings.

A. Article III, Section 1, Constitution of the United States vests in this Court "The judicial power of the United States * * *." In the exercise of such power, this Court is charged with supervisory functions in relation to proceedings in the federal courts. Moreover, meticulous regard for the integrity of the system of justice requires this Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

The disposition of this case by the Court of Appeals is one that requires that this Court intervene to make certain that justice is done. Here, on substantially less than a fully developed record, the Court of Appeals decided that Petitioner lacked standing to maintain any claim for relief under any of the federal statutes on which it relied. By so doing without notice or an opportunity to be heard, the Court deprived Petitioner of due process. This, it cannot do. *Singleton v. Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826, 837. The fundamental premise of the holding there is the settled rule that no appellate court should determine the question of standing on the basis of a less than fully developed record.

To do so represents and is a violation of due process of law under the Fifth Amendment to the Constitution of the United States. See also *Hormel v. Helvering* (1941) 312

U.S. 552, 85 L.Ed. 1037, cited with approval in *Singleton,* supra, and *Warth v. Seldin,* supra, where this Court said at page 501:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. (Citation omitted.) At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."

The decision of Courts of Appeals in other circuits are generally in accord, e.g., *British Airways Board v. Port Authority of New York* (C.A. 2) 558 F.2d 75, 82 (1977); *Denton v. Mr. Swiss of Missouri, Inc.* (C.A. 8) 564 F.2d 236, 239 (1977)—"* * * the due process clause of the Fifth Amendment to the Constitution limits the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits (Citation omitted) * * *"; and *California Diversified Services Inc. v. Musick* (C.A. 9), supra.[7]

However, in the instant case, the Ninth Circuit did exactly what it said should *not* have been done in *Musick,* supra. There, under the heading "Due Process Issues," on page 280, the Court stated in part as follows, per Judge Eugene A. Wright, who also wrote for the Court in the instant case:

> "This court has held that, when jurisdiction is present, it is error to dismiss a claim on the merits without notice, a hearing, and an opportunity to respond, unless the complaint could not be corrected by amendment."

7. In the *Musick* case, the District Court dismissed the case *sua sponte.* Appellants moved for and were granted a hearing under Rule 60(b), Federal Rules of Civil Procedure. At the hearing the Court denied the motion to set aside the dismissal and to grant leave to amend, and an appeal was taken. The Ninth Circuit reversed and remanded, saying the power to dismiss *sua sponte* is not absolute. It held that the trial judge should have given notice of his intention to dismiss, an opportunity to write a memorandum in oposition, a hearing and an opportunity to amend.

On this less than fully developed record, the Court of Appeals could not and did not say it would be impossible for Petitioner to amend its complaint to state a claim for relief and standing to assert it. Notwithstanding, the Court of Appeals, in its *first* and *second* opinions[8] concluded that the action "* * * should have been dismissed * * *" for lack of standing (App. p. 240).

IB

Basic Tenets of Fairness Require That the Court of Appeals Should Not Consider Issues Involving Questions of Fact Not Resolved by the District Court.

B. Compounding its major error, as set forth in Subsection A above, the Court of Appeals made impermissible findings of fact on issues not resolved by the District Court. Accordingly, it must be reversed and remanded. *British Airways Board,* supra. In the instant case, the District Court did not reach or decide the relevant facts or the law with respect to the merits of Petitioner's claim for relief arising out of a violation of the National Housing Act of 1949, as amended [42 U.S.C. 1460(c)(4)] and for an order setting aside Respondent HUD's concurrence in the land disposition price of federally financed urban renewal land. Nevertheless, the Court of Appeals *did* decide the merits of Petitioner's claim for relief under the National Housing Act of 1949, as amended, and under the Administrative Procedure Act (5 U.S.C. 702), stating (App. pp. 238-239): "* * * the relationship between the injury here and the

8. Petitioner filed two petitions for rehearing. In the second, filed on August 9, 1979, it called the attention of the Court to the due process of law question. (App. pp. 245-246).

alleged illegal agency action is too attentuated to meet the minimum Article III requirement."[9]

However, in *British Airways Board,* supra, the Court stated in part on page 82:

> "Basic tenets of fairness required that a federal appellate court should not consider an issue involving questions of fact not resolved below. It is 'essential * * * that parties may have the opportunity to offer all evidence they believe relevant to the issues * * *.' (Citations omitted.) We are particularly reluctant to affirm the District Court's grant of summary judgment on another ground—especially one not advanced by the parties—where the effect is to deprive the appellant from disputing facts material to that claim. *Fruge's Heirs v. Blood Services,* 506 F.2d 841, 844 (5th Circuit. 1975). * * *."

See also *Carter v. Stanton* (1972) 405 U.S. 669, 31 L.Ed.2d 569. There, on page 671, this Court stated in part:

> "Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim* * * *." (Emphasis added.)

The District Court's Order (App. p. 183) is both "opaque and unilluminating" as to either the relevant facts or the law with respect to the merits of Petitioner's claim under the National Housing Act of 1949, as amended. It was not even mentioned.

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9. Relief, if granted under 5 U.S.C. 706(2) for violation of a relevant statute, would require the Court to "* * * hold unlawful and set aside agency action taken without observance of procedure required by law." Neither the District Court nor the Court of Appeals made any effort to deal with an indispensable link in the chain of causation—an attempt to reach an illegal end by illegal means.

In *Fountain v. Filson* (1949) 336 U.S. 681, 93 L.Ed. 971, this Court held that where summary judgment is granted on one issue, an appellate court may not extend that judgment to another issue under the guise of affirming the result below, when the effect is to preclude the losing party from disputing facts material to that claim. Accordingly, and in the absence of a fully developed record, Petitioner submits that this Court should reverse and remand for further proceedings as the only proper resolution of this proceeding. *Heirs of Fruge v. Blood Services* (C.A. 5) 506 F.2d 841 (1975). Summary judgment for defendant reversed and remanded for consideration of an issue not resolved by the trial court. See also *City of Hartford v. Towns of Glastonbury* (C.A. 2) 561 F.2d 1032 (1976) (en banc) at page 1051:

> "If this were an appeal from a judgment granting defendants' motion to dismiss for lack of standing, we should be required to accept as true all the material allegations of the complaint. * * * However, we are reviewing *a final judgment based on a fully developed record* and the issue of standing is one on which the plaintiffs bear the burden of proof. * * *." (Citations omitted and emphasis added.)

In the instant case, the record has *not* been fully developed, and the burden of proof on the issue of standing cannot be shifted to Petitioner. In fact, Respondents failed to probe, pierce or contradict many material allegations of the Complaint by affidavit or other admissible evidence, e.g., Paragraph V(b) of the Complaint (App. p. 5), which alleged as follows:

> "(b) There is currently in the Rohnert Park Area a demand for approximately 627,000 square feet of retail floor space requiring the use of forty-five (45) acres of land. There are developers who are ready, willing and able to fulfill this demand in said site, but they are inhibited from doing so by the threat of

> a federally subsidized competing shopping center planned by Defendant Agency as hereinafter alleged."

and Paragraph VIII(b) (App. p. 8), referring to the natural and probable consequences of the exclusive agreement between Respondent Hahn and the Santa Rosa Respondents, all with the concurrence of Respondent HUD, which will be:

> "(b) To eliminate actual and potential competition from merchants located in other communities, including Plaintiff City, all to the irreparable loss or damage of Plaintiff City, its inhabitants, taxpayers and property owners."

Here, however, the Court of Appeals, in the role of protagonist has, without notice to Petitioner, and without supporting evidence, determined that its injury was too conjectural to merit relief, thereby making an impermissible finding of fact. To remedy Respondents' failures and to bolster its own unsupported conclusions, the Court of Appeals argued that before it could arrive at the point where Petitioner would be able to reap "the benefits of commercial development within its boundaries" (App. p. 239), it would have to make a number of assumptions. One such assumption would be "that financing would be available to fund an appropriate commercial development in Rohnert Park." (App. p. 239). However, no such assumption was or is necessary because of the above allegation quoted from Paragraph V(b). Since this and other material allegations were not probed or pierced by any evidence in a far less than fully developed record, they must be accepted as true by the Court of Appeals. Moreover, they raise a genuine issue of material fact. Rule 56(c), Federal Rules of Civil Procedure. On appeal, the Court of Appeals cannot make a finding contrary to these allegations, as it did in its *second* opinion, or make unsupported assumptions not pressed or raised by Respondents.

Pursuing further the matter of standing under the Administrative Procedure Act, the Court of Appeals argued that Petitioner "has failed to show that prospective injury to its proprietary interest 'is likely to be reduced by a favorable decision.' The scenario that would avert the injury is too 'conjectural' and 'hypothetical.'" (Citations omitted at App. pp. 239-240). The Court of Appeals also found that "* * * the relationship between the injury here and the alleged illegal agency action is too attenuated to meet the minimum Article III requirement."[10] Without a fully developed record, the quoted comments represent invalid and impermissible findings of fact and in conflict with decisions of this Court, *Carter v. Stanton, Warth v. Seldin,* and *Singleton v. Wulff,* all three cited supra.

II

The Decision Below Is in Conflict With a Decision in the Third Circuit, and a Hearing in This Court Will Secure Uniformity of Decision on the Requirements of Standing Within the Context of a Denial of Due Process of Law.

In *Mid-West Paper Products Co.,* supra, the Third Circuit, in an appeal from summary judgment, reversed and remanded, stating, *inter alia,* on page 590:

> "A private action for relief under § 16 is one of the weapons * * * in the arsenal established by Congress for policing the antitrust laws and for vindicating 'the important public interest in free competition.'" (Footnotes omitted.)

Petitioner submits that this case is in sharp conflict with the decision below. In *Mid-West Paper Products Co.,* the Third Circuit reversed and remanded since the District Court had not yet had occasion to determine whether

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10. This Court need not even reach the question whether Petitioner has a private right of action against Respondent HUD for violation of 42 U.S.C. 1460(c)(4), as the Court of Appeals did (App. pp. 231-232) relying on *Cort v. Ash* (1975) 422 U.S. 66, 45 L.Ed.2d 26. The point is that Respondents violated the law to reach an end forbidden under the antitrust laws.

plaintiffs there (indirect purchasers) had standing under Section 16 (15 U.S.C. 26) to state a claim for injunctive relief under principles of equity.

Petitioner submits that standing to maintain suits under Section 16, Clayton Act (15 U.S.C. 26) has gone largely unresolved. This Court has not expressed its opinion on this subject since its decisions in *Hawaii v. Standard Oil of California* (1972) 405 U.S. 251, 31 L.Ed.2d 184 (relief denied under § 4, but this Court merely discussed § 16 without applying it. All parties seemed to agree that the latter remedy might apply had injunctive relief been sought), and *Zenith Radio Corp.,* supra, at page 130, in 1969. Injunctive relief is available upon the demonstration of threatened injury, even though the plaintiff has not yet suffered actual injury, *Mid-West Paper Products Co.,* supra. As a result, the lower federal courts have adopted disparate approaches to this problem, and produced sharply conflicting holdings and reasoning. Moreover, because the various approaches lack sound analytical underpinning, even courts employing the same approach often fail to dispose of cases in a consistent, rational manner. In recent years, a number of judicial opinions have failed to make a critical distinction—the difference between antitrust standing and the scope of protection under substantive antitrust law.

Notwithstanding the constitutional power of the judiciary and a Congressional delimitation of the jurisdiction to exercise that power, the Court of Appeals concluded that Petitioner lacked standing, thereby deciding the threshold question not reached or decided by the District Court. So long as standing serves, on occasion, as a shorthand expression for all the various elements of justiciability, and serves interchangeably with other terms, such as ripeness, to sum up a judicious exercise of discretion in the use of the reviewing power, its convenience alone will preclude

this Court's adoption of more precision in the use of the concept. By the same token, discovering what the Court intends to convey when it relies on the concept will become increasingly difficult. That Petitioner, as well as all other persons seeking a judicial review on the merits, faces a difficult, perplexing and confusing task, is illustrated by the text which appears in Volume 13, Federal Practice and Procedure (Wright-Miller-Cooper), starting at page 54 of the 1978 Pocket Supplement, § 3531.

For example, the Court of Appeals, in its *second* opinion, cited *O'Shea v. Littleton* (1974) 414 U.S. 488, 38 L.Ed.2d 674 for the proposition that Petitioner's injury, whether real, immediate or threatened, was too "conjectural" and "hypothetical." Furthermore, the Court of Appeals said that the "prospective" injury to Petitioner would not in all likelihood be reduced by a favorable decision, presumably on the merits. These findings of fact on appeal are both erroneous and in excess of the appellate court's jurisdiction, since they (1) do violence to the provisions of Rule 56(c), Federal Rules of Civil Procedure, *British Airways Board,* supra; and (2) fail to accept as true all the material allegations of the complaint. *Warth v. Seldin,* supra.

In a later case, this Court held that a non-porfit corporation had standing to challenge racially discriminatory zoning practices. *Village of Arlington Heights v. Metropolitan Housing Development Corporation et al.* (1977) 429 U.S. 252, 50 L.Ed.2d 450. There, this Court stated on page 263:

> "It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing (Citations omitted). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest.

> See Sierra Club v. Morton, supra, at 739, 31 L.Ed.2d 636, 92 S.Ct. 1361. The specific project MHDC intends to build, whether or not it will generate profits, provides that essential dimension of specificity that informs judicial decision-making." (Citation omitted.)

Thus, this Court held that MHDC had met the constitutional requirements and it therefore had standing to assert its own rights "* * * Foremost among them is (its) MHDC's right to be free of arbitrary or irrational zoning actions." There can be no fundamental difference between this rationale and the right of Petitioner to be free of anticompetitive practices illegal under the Sherman Act (15 U.S.C. 2).

Unfortunately, however, this Court offered little new guidance for the task of locating the standing threshhold along the spectrum between the remedial benefits found too speculative in *Warth v. Seldin,* supra, and those found sufficiently probable in *Arlington Heights,* supra. However, the remedial benefits perspective on standing has taken on yet another aspect in *Duke Power Company v. Carolina Study Group* (1978) 438 U.S. 59, 57 L.Ed.2d 595. There, plaintiffs' action challenged the constitutionality of the Price-Anderson Act's limitation on liability for nuclear accidents. The plurality opinion of this Court agreed with the District Court that plaintiffs had Article III standing, but held that the Price-Anderson Act passed constitutional muster. On page 72, this Court stated as follows:

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues' (Citation omitted). As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury' to the plaintiff, (Citation omitted), but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." (Citations omitted.)

And on page 75, in Fn. 20, this Court also added in part that:

> "Our recent cases have required no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." (Citations omitted.)

In *Duke Power Co.,* supra, this Court found probable redress of the injury claimed on the ground that invalidation of the liability limitation would probably leave the utility unable to complete construction and operation of the two nuclear plants. In the instant case, it is perfectly clear that the injunctive relief sought by Petitioner under 15 U.S.C. 26 would, if granted, prevent the Santa Rosa Respondents from conveying the land to Respondent Hahn for use by it in constructing the regional shopping center. Moreover, relief, if granted against Respondent HUD, would require that its unlawful concurrence in the land disposition price at less than its fair value be set aside [5 U.S.C. 706(2)],[11] and the Santa Rosa Respondents could not convey the land, the fair value of which is a genuine issue of a material fact, to Respondent Hahn.

While this Court, in *Duke Power Co.,* supra, did not mention the "zone of interest" test of standing that for nearly a decade has seemed to impose prudential limits on standing, Petitioner, being in the target area of the attempt or conspiracy to monopolize, clearly meets this test. It has alleged a geographic and economic nexus with the Santa Rosa site of the challenged project. It has also alleged and demonstrated a significant threat of distinct and palpable injury from an ongoing violation of the antitrust laws.

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11. The *only* admissible evidence on fair value was submitted by Petitioner in opposition to the motions for summary judgment. It appears in the Affidavit of R. Dean Stahr (App. pp. 169-172).

Moreover, neither the District Court, which was silent on the issue of standing, nor either one of the *two* opinions of the Court of Appeals dispute the existence of this nexus. In *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661, 672 (1975), the Court held that: "* * * municipal interests fall within the scope of NEPA's protections." By the same token, Petitioner's municipal interests fall within the protection of the antitrust laws. The Court of Appeals also held that Petitioner lacked standing to assert its claim for relief under Section 16, Clayton Act (15 U.S.C. 26), stating that Petitioner could not sue as *parens patriae* (App. p. 228). It does not claim standing as such and never has.

If the Court of Appeals meant that Petitioner lacked standing because it could not show "threatened loss or damage," it ignored relevant allegations of the Complaint. One of these (App. pp. 5, 8) was an allegation as follows:

> "Hence, this publicly subsidized project (in Santa Rosa) will render non-competitive and therefore impractical any project for a retail center not similarly subsidized in the vicinity of Defendant City."

Petitioner is in the target area of the conspiracy or attempt to monopolize. Therefore, it faces "threatened loss or damage" by reason of its exclusion from the relevant market for new retail space. In applying Section 16 (15 U.S.C. 26), the courts have held that complainants need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See page 591 of *Mid-West Paper Products,* supra, and cases cited in Fn. 72 thereof. Finally, the Court of Appeals said (App. p. 229) ". . . It (Petitioner) cites no authority supporting the contention that this (action in its proprietary capacity) is a sufficient proprietary interest under § 16, and we decline to so hold." Yet its Fn. 5 (App. p. 229) refers to

the very case Petitioner did cite for this contention, making a wholly artificial distinction between it and the instant case.

Accordingly, Petitioner submits that the Court of Appeals has introduced a formidable array of ambiguities that do not provide any guidance whatsoever through the minefield of standing doctrine. Its opinion shows a movement away from clarity toward additional obfuscation and away from liberalization toward a raising of standing barriers against plaintiffs in federal courts. Logically confused and inconsistent with relevant Supreme Court decisions, some cited supra, the Court of Appeals opinion in the instant case appears to be a far more insidious avoidance approach than was the older legal interest test. It has perpetuated a formalism that is showing signs of decay. See *Mid-West Paper Products,* supra.

Petitioner respectfully urges this Court to grant this writ for the purpose of (1) enunciating clearly and unambiguously the requirements of standing in non-constitutional federal question cases, and (2) securing uniformity of decisions in the federal courts. Prudential considerations aside, Petitioner submits that the sole test of standing should be whether it has been or will be adversely affected by unlawful governmental action, carried out in concert with others with an anticompetitive purpose. If direct proof of causal relationships is difficult or impossible, the trial and appellate courts should make a judgment whether a causal relation is sufficiently probable to allow standing, rather than an offhand statement that it is too attenuated to support standing. All the pleadings, indeed, the entire record can and should be carefully scrutinized in applying this test. Here, it was not.

CONCLUSION

For all the reasons stated above, Petitioner respectfully submits that the Court of Appeals has sanctioned a gross

and plainly erroneous departure from the accepted and usual course of judicial proceedings, has ruled in a manner fundamentally inconsistent and in direct conflict with its own decisions as well as those in other circuits and decisions of this Court. Therefore, Petitioner respectfully submits that this petition for writ of certiorari should be granted.

Dated, San Francisco, California
January 3, 1980

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Petition for Writ of Certiorari and separate Appendix were mailed postage prepaid to the counsel of record of Respondents as stated below:

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